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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

KELLOGG COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN C. DONNELLY,
DAVID M. HAYES
WILLIAM V. KOKKO,
CLARK, KLEIN, WINTER, PARSONS & PREWITT,
1600 First Federal Building
1001 Woodward Avenue
Detroit, Michigan 48226
Attorneys for Petitioner Kellogg Company

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Kellogg Company, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on March 22, 1972.

OPINIONS BELOW

The opinion of the trial examiner for the NLRB holding that Petitioner had not engaged in any unfair labor practices is printed in Appendix C hereto. The majority opinion of the NLRB finding that Petitioner had violated Section 8 (a)(1) of the National Labor Relations Act and the dissenting opinion of member Kennedy are recorded at 189 NLRB No. 123, 77 LRRM 1071 (1971) and are printed in Appendix B hereto. The opinion of the Court of Appeals enforcing the order of the NLRB, is printed in Appendix A hereto and is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals, printed in Appendix A hereto, was entered on March 22, 1972. This Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1) When the leaders of both an international union and one of its local unions publicly and repeatedly expressed to their members their agreement with the employer that a no-strike clause they had negotiated was intended to and did prohibit the members of that local union from honoring a picket line established by another union representing other employees of the same employer at the same plant, may a court ignore such evidence of intent and interpret an ambiguous no-strike clause as not prohibiting such action, in disagreement with the parties' expressed intent, and based upon narrow common law principles of contract interpretation applicable to ordinary commercial contracts?

2) Is such a decision and the principle of contract interpretation upon which it is based contrary to the public policy of the National Labor Relations Act and the principles enunciated by this court in its decisions interpreting that Act and interpreting no-strike clauses in collective bargaining agreements in that they promote industrial strife (a) by making it necessary for bargainers to negotiate collective bargaining agreements with much greater emphasis upon precision of language similar to that required by commercial contracts thereby encouraging disagreements over language in addition to disagreements over substance; (b) by narrowing the scope of a no-strike clause over objections of the contracting parties; and (c) by undermining the status of the union as the sole spokesman for its members in all matters relating to working conditions, including good faith statements of what the union intended when it negotiated a collective bargaining agreement?

STATUTORY PROVISIONS INVOLVED

Sec. 7, *National Labor Relations Act*, 29 U.S.C. Section 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Sec 8, *National Labor Relations Act,* 29 U.S.C. Sections 158(a)(1), (b)(1):

(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees—in the exercise of the rights guaranteed in section 157 of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

Sec 9, *National Labor Relations Act,* 29 U.S.C. Section 159(a):

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee of a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining

contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

STATEMENT OF CASE

Petitioner, Kellogg Company, employs at its Battle Creek, Michigan plant approximately 3500 unionized employees, all of whom belong to Local 3 of the American Federation of Grain Millers (AFL-CIO), except for approximately 150 employees who belong to Local 480 of the Printing Specialty and Paper Products Union (The Pressmen). In the spring of 1969 Petitioner was engaged in collective bargaining on its collective bargaining agreements with both local unions. On April 26, 1969, Petitioner and the Grain Millers reached agreement on a new Grain Millers local contract which was ratified and signed on that date by the Union and made retroactive to April 15.

The new Supplemental Agreement between Petitioner and the Grain Millers contained the following no strike provisions:

"*Section 1101*

(a) During the life of this Supplemental Agreement no strike or work stoppages in connection with disputes arising hereunder shall be caused or sanctioned by the Union, or by any member thereof, and no lockout shall be ordered by the Company in connection with such disputes.

(b) It is agreed that any authorized legal strike that may be called by the Union, or any lockout by the Company on or after the expira-

tion of the Master Agreement in an effort to secure a new Master Agreement shall not be deemed a breach of the provisions of this Supplemental Agreement prohibiting strikes or work stoppage and lockouts during the life of this Supplemental Agreement.

(c) It is agreed that any authorized legal strike that may be called, or any lockout by the Company, on or after the expiration of this Supplemental Agreement in an effort to secure changes in or a new agreement, shall not be deemed a breach of the Master Agreement.

Section 1102

During the life of this Supplemental Agreement, no sympathy strike shall be caused or sanctioned by the Union because of differences between the AFL-CIO or any of its affiliated Unions and any other local or national employers, except for differences between the AFL-CIO or any of its affiliated Unions involving other plants of the Company.

Section 1103

It is agreed that before a strike may be called the Company will be given a copy of the written authorization which is provided to the local Union by the President of the AMERICAN FEDERATION OF GRAIN MILLERS authorizing such action to be taken in accordance with its Constitution and By-laws."

On April 25, 1969, the Pressmen struck over the terms of a new local contract and established picket lines at Petitioner's Battle Creek Plant.

The Grain Millers Union, both the International and local, instructed its members that their contract forbade

strikes and required that they cross the Pressmen's picket line and report for work. This was communicated by statements over the local radio stations, statements in the local press, by bulletin board communication as well as by other means. Some examples were:

1. On April 25, 1969, Howard Roe, President of Local 3 of the Grain Millers, issued a statement carried in news broadcasts on local radio stations, advising the Grain Millers members that their contract required them to report for work.

2. The Battle Creek Enquirer and News on April 26 carried a story which indicated that Mr. Roe and his executive committee were instructing members to remain on the job—despite picket lines— "because the company contract is still in force."

3. On April 29, 1969, Mr. Wilburn, President of the International Union of Grain Millers, sent a telegram from the International Headquarters in Minneapolis which was posted on the Union bulletin boards at the Battle Creek plant instructing the Grain Miller members to honor their contract and report for work. In order to achieve wide dissemination of the telegram, the leaders of Local 3 purchased time on a local radio station and broadcast the following message to the union members:

"Here is a message from Howard Roe, President, and Robert Willis, Business Agent of Local 3. The American Federation of Grain Millers have received the following telegram:

'A small number of members of Local 3 are violating their own contract by refusing to report to work. Please advise these members that they are in violation of a valid contract with the Kellogg

> Company which has been approved by the membership of Local 3 and the International Union, and further instruct these members that in order to protect their jobs they must report to work immediately.'"

4. On July 11, 1969, in an article in the local press, Robert W. Willis, Business Agent for the Grain Millers, was quoted as follows:

> "Our contract's no-strike clause would make any member lay his job on the line if he refused to cross the pressmen's picket line in order to support the strike. * * * Our attorneys advise us that our no-strike clause makes members liable to discharge if they fail to come to work because they refuse to cross the picket line.

Almost all 3,350 members of the Grain Millers agreed with their leadership and reported for work, except 2, a Mrs. Putman and a Mr. Sutfin. When these 2 employees persisted in refusing to report to work they were discharged. Their discharges were the basis for the unfair labor practice complaints that caused this case.

On July 18, 1969, an unfair labor practice charge was filed against Petitioner herein, Kellogg Company, claiming the 2 discharges were improper. The General Counsel of the National Labor Relations Board thereafter issued a complaint alleging that Petitioner violated Section 8(a)(1) [29 U.S.C. § 158(a)(1)] of the National Labor Relations Act by these discharges.

The Board's Trial Examiner on November 5, 1970 issued his decision finding that Kellogg had not engaged in any unfair labor practices and recommending that the complaint be dismissed. The Trial Examiner found that the two employees in refusing to cross the picket line violated

the no-strike clause in the Grain Miller's contract with Kellogg Company and therefore were engaged in unprotected activity under the Act.

A three-member panel of the National Labor Relations Board by a 2-1 vote rejected the Trial Examiner's recommendations and found that Petitioner had violated Section 8(a)(1) of the Act by discharging the two employees for their refusal to cross the picket line. Accordingly, the Board ordered Petitioner to cease and desist from interfering with, restraining, and coercing employees in the exercise of their rights guaranteed by Section 7 (29 U.S.C. § 157) of the Act and directed Petitioner to take certain affirmative action in respect thereto.

Petitioner filed a petition for review of the aforesaid order of the Board and the Board thereafter filed a cross application for enforcement of the order. The Court of Appeals for the 6th Circuit affirmed the holding of the Board and enforced its order.

The Court of Appeals refused to consider the mass of evidence showing the clear and unmistakable intent of the contracting parties as to the scope of the applicable no strike prohibition. Instead, the court looked only to the language of the contract even though it was ambiguous and held that thre was "no need for [consideration of] extrinsic evidence." In support of this holding, the Court of Appeals cited only two Federal District Court decisions, not cited in the briefs of either petitioner or respondent, holding that the traditional common law principles apply in interpretation of collective bargaining agreements. The Court of Appeals then determined that the contract language did not prohibit the employees from honoring the Pressman's picket line, hence the employees were engaged in protected concerted activity under Sections 7 and 8(a)(1) of the National Labor Relations Act.

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Sixth Circuit is in Conflict With Prior Decisions of this Court.

The Sixth Circuit's view of the interpretation of collective bargaining agreements, including no-strike clauses, is summarized in the two quotations used to justify its approach which were taken from two Federal District Court cases, *Refinery Employees' Union* v. *Continental Oil Co.*, 160 F. Supp. 723, 730-731 (W.D. La. 1958) and *Industrial Trades Union of America* v. *Woonsocket Dyeing Co.*, 122 F. Supp. 872, 875 (D.RI. 1954), appearing on pages 9-11 of its printed opinion (App A). Both quotations set forth clearly the principles of contract interpretation esposed by this particular panel of the Sixth Circuit and both obviously read like traditional discussions of the common law parol evidence rule applicable to commercial contracts.

This view is clearly contrary to the principles this Court has enunciated regarding the application of no-strike clauses and the interpretation of collective bargaining agreements. For example, in *Transportation Communication Employees Union* v. *Union Pacific R.R. Co.*, 385 U.S. 157, 160-161 (1966), reh. denied, 385 U.S. 1032 (1967), this Court stated that:

> "A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common law concepts which control such private contracts . . . [I]t is a generalized code to govern the myriad of cases which the draftsman cannot wholly anticipate

> . . . The collective agreement covers the whole employment relationship, calls into being a new common law—the common law of the particular industry or of a particular plant . . . In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements."

And this Court stated in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-581 (1960) that:

> "Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations [the labor agreement] is, in the words of the late Dean Shulman, 'a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith.' [*Shulman, Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1004-1005.] Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators."

This rule of construction of collective bargaining agreements is not new or unknown, but rather is a proposition which has been espoused by this Court and by legal commentators on frequent occasions. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964); *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967); Cox, *The Legal Nature of*

Collective Bargaining Agreements, 57 Mich. L. Rev. 1, 3-5 (1958); Cox, *Reflections Upon Labor Arbitration,* 72 Harv. L. Rev. 1483, 1499-1500 (1959), and Summers, *Judicial Review of Labor Arbitration,* 2 Buff. L. Rev. 1, 17-18 (1952).

Further, the decision of the Sixth Circuit is clearly contrary to the principles expressed long ago by this Court in *NLRB* v. *Rockaway News Co.,* 345 U.S. 71 (1953). It was established in *Rockaway News* that extrinsic evidence may be considered in determining the intent of the parties as to the scope of a no-strike provision.

II.

The Decision of the Sixth Circuit is in Conflict With the Decision of the District of Columbia Circuit and With the Principles Espoused by the Eighth Circuit Court of Appeals.

The decision of the court below creates a conflict among the circuit courts of appeal.

In *News Union of Baltimore v. NLRB,* 393 F. 2d 73 (D.C. Cir. 1968), the court was faced with a fact situation virtually identical to that in this case. Similar to the facts of this case, the employer and the ITU in *News Union* were parties to a collective bargaining contract which contained a no strike clause; some employees of the employer represented by another union went out on strike and the members of the ITU refused to cross the picket lines; ITU officials warned their membership that a sympathetic refusal to cross the picket line would be a breach of the no strike clause in their collective bargaining contract; nevertheless, the ITU members continued in their refusal to cross the picket lines and were disciplined. The District Court of Columbia Court of Appeals held that the statements by

the parties to the collective bargaining agreement that the no strike clause applied could and should be considered and that it proved the meaning of the no strike clause.

Recently, in *Montana-Dakota Utilities Co.* v. *NLRB,* 455 F. 2d 1088 (8th Cir. 1972), the 8th Circuit adopted the philosophy of contract interpretation set forth in the *News Union* case and followed this Court's decision in *Rockaway News* which recognized the persuasiveness of extrinsic evidence in determining whether the parties had intended a no-strike clause to apply to a sympathy strike situation. The philosophy underlying the interpretation of no-strike clauses by the Courts of Appeal in *News Union* and *Montana-Dakota* is clearly in conflict with the philosophy of the Sixth Circuit in the present case. The formers' philosophy is summarized in the following passage from the *Montana-Dakota case,* quoting from the *News Union* decision, as follows:

> Petitioners point out that there is no explicit reference to the crossing of picket lines and suggest initially that language which in terms inhibits only a strike is not to be read as restricting the observance of picket lines. But the practical relationship between work stoppages and the honoring of picket lines is so well understood in the industrial climate that we think that a clause of this kind using only the word 'strike' includes plant suspensions resulting from refusals to report for work across picket lines. *NLRB* v. *Rockaway News Supply Co.,* 345 U.S. 71, 73 S.Ct. 519, 97 L. Ed. 832 (1953). 393 F. 2d 673, 676-677. [455 F. 2d at 1093.]

By contrast, the Sixth Circuit held that since the no-sympathy strike clause made no reference to the right of the members to refrain from crossing a picket line, there was nothing in the language of the contract which prohibited a member of the Grain Millers at Kellogg's Battle Creek

plant from honoring the picket line of another union at the same plant. The Court therefore refused to consider the clear evidence of the parties' intent in agreeing on the no-strike provisions of the contract.

In view of the conflict among the Courts of Appeal, we think it appropriate that this Court now review the principles enunciated by the Supreme Court in *Rockaway News* and by the Courts of Appeal in *News Union* and *Montana-Dakota* and apply those principles to our factual situation.

III.

A. The decision of the Sixth Circuit, in refusing to consider extrinsic evidence showing the intended scope of the no-strike prohibition, will cause increased disputes over the language of collective bargaining agreements and thereby discourage the peaceful settlement of industrial disputes.

The decision by the Court below should be reversed because it is contrary to the public policy of the National Labor Relations Act, which is to encourage the peaceful settlement of industrial disputes. Further, the decision is totally unrealistic and ignores the realities of life at the bargaining table. It is a well known fact that collective bargaining agreements are frequently negotiated under conditions of great stress and pressure, with physically tired negotiators often facing a strike deadline. These pressures cause the substance of a collective bargaining agreement to be of paramount importance and often effectively preclude negotiators from engaging in the niceties of a skilled scrivener's turn of phrase. It is not surprisin, therefore, that much of the language in a collective bargaining agreement is totally ambiguous, or does not mean in the minds of the parties what it may seem to mean to

an outsider reading it for the first time. A classic example is the very no-strike clause in question, which is patently ambiguous and defies an interpretation of its meaning without reference to outside evidence. This ambiguity is self evident if the no-sympathy strike clause contained in Section 1102 is read even casually. The approach adopted by the Sixth Circuit in interpreting collective bargaining agreements will result in barring all reference to bargaining history and to the practice of the parties under collective bargaining agreements which, as every experienced bargainer knows, is relied on heavily by the bargaining parties themselves when they agree to language.

Unions generally bargain without attorneys and companies frequently do, and we think it too much to expect that the parties to a labor contract be required to show the skills in draftsmanship that are perhaps expected of attorneys in the business world drafting commercial contracts. Parties to contracts often agree to language which they would not otherwise agree to because they "know what they mean." We suggest that with all due respect to the Honorable Judges of this panel of the Sixth Circuit that their approach to the interpretation of the Kellogg-Grain Millers contract ignores the realities of the bargaining table, and that additional troubles will be posed to all persons engaged in collective bargaining by this undue emphasis on an old fashioned common-law approach to interpretation of such agreements.

B. The decision of the Sixth Circuit narrowed the scope of the no-strike clause contrary to the parties' intent and contrary to principles established by this Court.

The decision of the Court of Appeals narrowed the scope of the no-strike clause in direct contradiction to that which the bargaining parties said that it meant. Such holding is contrary to the principles which the United States Supreme Court has promulgated regarding the nature of collective bargaining agreements in general, and the interpretation of no-strike clauses in particular. In a long line of cases this Court has supported the twin methods of settling industrial disputes; namely, arbitration coupled with a no-strike clause. As part of its support of arbitration as the means to settle industrial disputes, this Court has expanded the importance and application of no-strike clauses. For example, in *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960), this Court greatly expanded the scope of the no-strike clause that the parties had negotiated, and established that clause as the *quid pro quo* of the binding arbitration clause of that contract. And only recently, in *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970), the Supreme Court indicated the importance it attached to no-strike clauses by reviving the injunctive arm of the Court to enforce a valid no-strike clause.

Our factual situation involves the interpretation of a Collective Bargaining Agreement which contains a patently ambiguous no-strike clause. The ambiguities contained in this Contract were resolved when the parties to the Agreement went on record, unequivocally expressing their intent and understanding as to the scope of that clause. Yet the Court below chose to ignore these unequivocal expressions

and adopted an interpretation of the no-strike clause which severely narrowed its scope. This limitation of the scope of the no-strike clause, especially in the face of evidence of contrary intent, is at odds with this Court's philosophy of strengthening no-strike clauses.

C. The decision of the Sixth Circuit in protecting unauthorized refusals to cross picket lines handicaps union leaders in their efforts to bring about stability in labor management relations and violates the national labor policy of vesting authority in a chosen representative to act in the interests of all employees in a single unit.

The decision below will further have the effect of undermining the right of employees to bargain collectively through representatives of their choosing and will handicap the duly elected union leaders in their efforts to bring about stability in labor-management relations. The Court of Appeals holding places employers in the impossible position of attempting to placate any number of small groups of employees, while attempting at the same time to abide by the terms of a valid collective bargaining agreement and to meet in good faith whatever demands the bargaining representatives put forth under that agreement.

As stated in Note, *Refusals to Cross Picket Lines*, 62 Yale L.J. 92, 95 (1952) speaking on the question of individual action in labor relations:

> "Although protecting such unauthorized refusals [to cross a picket line] would have the advantage of permitting workers to make decisions tailored to their individual needs and preferences, it would also have serious disadvantages. If the individual worker is allowed to make such vital decisions independently of his union, the employer will be less

> likely to look to the union as a responsible bargaining agent. As a result, stability of labor-management relations may be impaired."

Furthermore, the decision of the Sixth Circuit clearly has significance beyond the facts of this case. If an individual is allowed to engage in sympathetic action in contravention of the contract negotiated by the union and in contravention of the express orders of union leaders, such individual likely will not consider the serious consequences that may flow from his actions. Virtually all workers in a sympathy strike situation are faced with the problem of whether to cross the picket line and a relatively large number may refuse to report to their jobs in view of the protection afforded by the Sixth Circuit decision. The likely result will be a complete or partial work stoppage causing serious and sometimes devastating injury to the employer. Ironically, such a stoppage may also force other union members—even a majority—to suffer wage loss without their consent. This result is clearly contrary to the policy of the National Labor Relations Act which, as stated by this Court:

> "Extinguishes the individual employees' power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." [*NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967)].

In short, the decision of the Court of Appeals ignoring clear evidence of the union leaders' intent when they negotiated the contract serves to vitiate national labor policy with respect to one of its most fundamental points, the idea of only one bargaining spokesman for all employees in a single unit.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

JOHN C. DONNELLY,
DAVID M. HAYES,
WILLIAM V. KOKKO,
CLARK, KLEIN, WINTER, PARSONS
& PREWITT
1600 First Federal Building,
1001 Woodward Avenue,
Detroit, Michigan 48226
Attorneys for Petitioner,
Kellogg Company.

Dated:

APPENDIX A

No. 71-1367

UNITED STATES COURT OF APPEALS

for the Sixth Circuit

Kellogg Company,
Petitioner,

v.

National Labor Relations Board,
Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board.

OPINION

Decided and Filed March 22, 1972.

Before: Miller and Kent, Circuit Judges, and O'Sullivan, Senior Circuit Judge.

Kent, Circuit Judge. This is a petition for review of an order of the National Labor Relations Board[1] and a cross petition for enforcement of such order.

The Board ordered reinstatement of two employees of the petitioner with back pay. The Board reversed its Trial Examiner in reaching the conclusion that the employees were entitled to reinstatement. There is little dispute about the facts.

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[1] 189 N.L.R.B. No. 123.

Petitioner's plant in Battle Creek, Michigan, employs approximately 3,500 people. The majority of the hourly rated employees are members of Local No. 3, American Federation of Grain Millers, AFL-CIO, (herein referred to as the Millers). The remainder of the employees (approximately 150) are represented by Printing Specialty and Paper Products Union Local No. 480, International Printing Pressmen and Assistants' Union of North America AFL-CIO. (herein referred to as the Pressmen).

During the month of April, 1969, the contracts which the petitioner had with each of the Unions expired. The contract of the Millers expired on April 15, but the parties agreed to an extension to May 2 while negotiations continued. A new agreement was reached on April 26, 1969, which was made retroactive to April 15. The agreement between the petitioner and the Millers Local No. 3 was termed a supplemental agreement and included all of the provisions of a master agreement between the Millers International Union and the Company, negotiated in February, 1969, and designed to cover four of the Company's plants. The Pressmen were not as successful as the Millers with their negotiations with the Petitioner and went on strike on April 25, 1969. The strike was not settled until July 22, 1969. The two employees who were the subject of these proceedings refused to cross the Pressmen's picket line and after hearing, in accordance with the Millers' contract, were discharged (for nonattendance). They were not discharged for violation of the no strike clause.

Robert Sutfin, one of the employees, was the son, and Elaine Putnam was a wife, of striking members of the Pressmen. Each employee had been previously warned in regard to excess absenteeism on more than one occasion.

While the basic issues involved relate to the interpretation of the contract between the Petitioner and the Millers,

there are also presented questions as to whether the employees' refusal to cross the picket line was because they were honoring the picket line or because of personal reasons, and also as to whether or not each of the employees had made an unconditional demand for reinstatement..

The Master Agreement, incorporated into the supplemental Agreement negotiated by Local No. 3 of the Millers, contained the following provisions relating to strikes and lockouts:

NO STRIKES—NO LOCKOUTS

Section 1101

(a) During the life of this Supplemental Agreement no strike or work stoppages in connection with disputes arising hereunder shall be caused or sanctioned by the Union, or by any member thereof, and no lockout shall be ordered by the Company in connection with such disputes.

(b) It is agreed that any authorized legal strike that may be called by the Union, or any lockout by the Company on or after the expiration of the Master Agreement in an effort to secure a new Master Agreement shall not be deemed a breach of the provisions of this Supplemental Agreement prohibiting strikes or work stoppages and lockouts during the life of this Supplemental Agreement.

(c) It is agreed that any authorized legal strike that may be called, or any lockout by the Company, on or after the expiration of this Supplemental Agreement in an effort to secure changes in or a new agreement, shall not be deemed a breach of the provisions of the Master Agreement.

NO SYMPATHY STRIKE

Section 1102

> During the life of this Supplemental Agreement, no sympathy strike shall be caused or sanctioned by the Union because of differences between the AFL-CIO or any of its affiliated Unions and any other local or national employers, except for differences between the AFL-CIO or any of its affiliated Unions involving other plants of the Company.

STRIKE AUTHORIZATION

Section 1103

> It is agreed that before a strike may be called the Company will be given a copy of the written authorization which is provided to the local Union by the President of the AMERICAN FEDERATION OF GRAIN MILLERS authorizing such action to be taken in accordance with its Constitution and Bylaws.

The petitioner has at all times taken the position that the terms of the contract, quoted above, made it a violation of the contract for the members of the Millers to honor a picket line of another Union at the Battle Creek plant.

At the out-set of the Pressmen's strike many of the members of the Millers refused to cross the Pressmens' picket line. All, except the two here involved, returned to work after the Company warned them that they were violating the Collective Bargaining Agreement by refusing to cross the picket line, and after Representatives of the Local and International of the Millers informed the members of that Union that a sympathy strike was not permitted under the

newly negotiated contract. The position taken by Union officials in their interpretation of the contract was communicated to the members through statements given to the local newspapers, to the local radio stations, and by means of notices posted on Company bulletin boards asking workers to report to work and honor their contract.

The Trial Examiner took evidence relating to the advice given by Local and International officers of the Millers and based his conclusion in part upon such evidence. The Board in reversing the Trial Examiner took a different view of this evidence, extraneous to the contract, and reached a different conclusion, as pointed out above.

The Court of Appeals for the District of Columbia in *News Union of Baltimore* v. *N.L.R.B.*, 393 F.2d 673 (D.C. Cir., 1968), concluded that the position taken by Union officials that the no strike provisions of the contract covered sympathy strikes was strong evidence that the clause was intended to bar such strikes; and in *N.L.R.B.* v. *Rockaway News Co.*, 345 U.S. 71 (1953), the United States Supreme Court approved the consideration of extrinsic evidence as an aid in determining the coverage intended by a broad no strike agreement. However, this Circuit in weighing the effect of the attitude of Union officers in regard to refusal to cross another Union's picket line stated in *N.L.R.B.* v. *Difco Laboratories, Inc.*, 427 F.2d 170, 172 (6th Cir., 1970):

> "Finally, whether the UAW did or did not want the two discharged employees to strike obviously has no bearing on their right to do so if they considered such action to be in their own best interest."

Thus, we conclude that if the Millers contract did not prohibit the sympathetic honoring of another Union's picket line then Putnam and Sutfin were engaging in protected

concerted activity (as will be pointed out hereafter), and if the contract did prohibit such activity then they were properly discharged. We, therefore, conclude that after removing the factual issues we are faced with one fundamental problem: The interpretation of the Millers contract no strike clauses.

The right to strike is guaranteed by the National Labor Relations Act, 29 U.S.C. § 151 et seq., as interpreted in numerous cases. The United States Supreme Court in *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963), stated at page 233:

> "Section 7 guarantees, and § 8(a)(1) protects from employer interference the rights of employees to engage in concerted activities, which, as Congress has indicated, H.R. Rep. No. 245, 80th Cong., 1st Sess. 26, include the right to strike."

See also *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963). Any doubt as to the right to strike is removed by the Act itself. 29 U.S.C. § 163[2].

The right of employee members of one Union to engage in concerted activities in support of the members of another Union has been reviewed by this Court in *N.L.R.B.* v. *Difco Laboratories, Inc.*, 427 F.2d 170 (6th Cir., 1970), where at page 171 we said:

> "[2] Nonetheless, respondent contends that under the circumstances of this case, it had a right as an employer to require these two employees, who were not

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[2] "§ 163. Right to strike preserved

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right. July 5, 1935, c. 372, § 13, 49 Stat. 457: June 23, 1947, c 120, Title I, § 101, 61 Stat. 151."

members of the union which struck and picketed at respondent's plant, to cross the picket line on pain of discharge for failure to do do. This court has previously dealt with essentially the same contention in NLRB v. City Yellow Cab Co., 344 F.2d 575 (6th Cir. 1965), wherein we said:

"The cabdrivers testified that they went on strike and engaged in picketing because they were in sympathy with the demand of the switchboard operators for recognition. The Act protects the rights of employees 'to engage in * * * concerted activities for the purpose of * * * mutual aid or protection' 29 U.S.C. § 157. N.L.R.B. v. Halsey W. Taylor Company, 342 F.2d 406 (C.A. 6, March 3, 1965).

"As said by Judge Learned Hand in N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505 (C.A. 2):

" 'Certainly nothing elsewhere in the act limits the scope of the language to "activities" designed to benefit other "employees"; and its rationale forbids such a limitation. When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out an strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.'

See also N.L.R.B. v. Greensboro Coca Cola Bottling Co., 180 F.2d 840 (C.A. 4); N.L.R.B. v. Schwartz, 146 F.2d 773 (C.A. 5).

This, however, does not mean that an employee may refuse to cross another Unions' picket line for personal reasons. *N.L.R.B.* v. *Union Carbide Corporation,* 440 F.2d 54, 56 (4th Cir., 1971):

> "One who refuses to cross a picket line by reason of physical fear does not act on principle. He makes no common cause, and contributes nothing to mutual aid or protection in the collective bargaining process. We hold, therefore, that Mullins' refusal to cross the picket line was not protected activity under Section 7, and enforcement of the Board's order as to him will be denied."

We reiterate that the right to strike is protected by law, whether it be for economic reasons, for the purpose of improving working conditions, or for mutual aid or protection of employees who are members of another Union. This right may be surrendered or waived by appropriate provisions in the collective bargaining agreement. *Mastro Plastics Corporation* v. *N.L.R.B.,* 350 U.S. 270, 280 (1956):

> "On the premise of fair representation, collective-bargaining contracts frequently have included certain waivers of the employees' right to strike and of the employers' right to lockout to enforce their respective economic demands during the term of those contracts. *Provided the selection of the bargaining representative remains free,* such waivers contribute to the normal flow of commerce and to the maintenance of regular production schedules. Individuals violating such clauses appropriately lose their status as employees."

and the right to engage in a sympathy strike or the right to refuse to cross a picket line may be waived in the same manner. *N.L.R.B.* v. *Rockaway News Co.,* 345 U.S. 71, 80 (1953):

> "In the section by which the Labor Management Relations Act prescribes certain practices of labor organizations which shall be deemed unfair, there is a proviso that nothing therein "shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act . . .." This clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree. And nothing in the Act prevents their agreeing upon contrary provisions if they consider them appropriate to the particular kind of business involved. An employee's breach of such an agreement may be made grounds for his discharge without violating § 7 of the Act. *Labor Board* v. *Sands Co.*, 306 U. S. 332, 334."

and if there is such a waiver of the right to honor another Union's picket line all members of the bargaining unit are bound by the terms of the contract. As stated by this Court in *Plasti-Line, Incorporated* v. *N.L.R.B.*, 278 F.2d 482, 486 (6th Cir., 1960):

> "[1, 2] The Act is based upon the principle of promoting industrial peace through collective bargaining and an orderly settlement of disputes. The law imposes on the employer the positive duty to bargain with the representative of the majority of his employees and not to bargain with any other. Therefore, a minority group must acquiesce in the decisions and actions of such representative."

The basic question is the interpretation of the contract between the Millers and the Petitioner. It has been recog-

nized that a collective bargaining agreement is not an ordinary contract. *Transportation Union* v. *U.P.R. Co.*, 385 U.S. 157 (1966). Such an agreement is not necessarily interpreted according to the general laws relating to the interpretation of contracts. As Mr. Justice Brennan stated in a concurring opinion in *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 570 (1960):

> "Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of industrial self-government, like words in a statute, are to be understood only by reference to the background which gave rise to their inclusion."

As previously stated the use of extrinsic evidence as an aid in interpreting a collective bargaining agreement has been approved in *News Union of Baltimore* v. *N.L.R.B.*, 393 F.2d 673, 678 (D.C. Cir., 1968).

We quote with approval from certain District Court decisions relating to the interpretation of collective bargaining agreements. As was stated in *Refinery Employees' Union* v. *Continental Oil Company*, 160 F.Supp. 723, 730-731 (W. D. La., 1958):

> "[5-12] The accepted common law principles to be applied in the interpretation of agreements applicable here are these: (1) Courts give legal effects to contracts as written. However general be the terms in which a contract is couched, it extends only to those things concerning which it appears that the parties intended to contract. The intent is to be determined by the words of the contract when they are clear and explicit and lead to no absurd consequences. It is the common intent that is to be sought, for if there is a differ-

ence of intent there is no common consent and no agreement. (2) When there is doubt as to the meaning of certain words, they may be explained by referring to other words and phrases used therein. (3) All clauses of any agreement are interpreted the one by the other, giving to each the sense that results from the entire Act. (4) Courts cannot make contracts for the parties, and can declare implied obligations to exist only when there is a satisfactory basis in the express provisions of the agreements which make it necessary to imply certain duties and obligations in order to effect the purposes of the parties. Before an obligation will be implied it must appear from the contract itself that it was so clearly in the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so, or that it is necessary to give effect to and effectuate the purpose of the contract as a whole."

To the same effect is *Industrial Trades Union* v. *Woonsocket Dyeing Co.*, 122 F.Supp. 872, 875 (D.R.I. 1954):

"[1] In Pawtucket Mach. & Supply Corp. v. Monroe 1947, 73 R.I. 162, at page 164, 54 A2d 399, 400, the rule to be followed in determining the construction to be given to the foregoing provisions is well set forth in the following language:

'The cardinal rule in the construction of a written instrument is to read its language in connection with the relative position and general purpose of the parties and to gather from it, if one can, their intent as to the particular matter in dispute. In other words, in construing a written instrument the object sought is to ascertain and give effect, in so far as the rules of law will permit, to the intention of the

parties. Sullivan v. Rhode Island Hospital Trust Co., 56 R.I. 253 [185 A. 148]; Co-operative Building Bank v. Hawkins, 30 R.I. 171, 181 [73 A. 617]; Tillinghast v. Fry, 1 R.I. 53, 57. The intention sought is only that expressed in the instrument and not some undisclosed intention that the parties may have had in mind.'

"Collective bargaining agreements like other contracts are to be given a reasonable construction, not one which results in injustice and absurdity. Weaver v. United States, 8 Cir., 1954, 210 F.2d 815."

This Court has held that the relinquishment of a right to strike must be expressed in "clear and unmistakable language." In *Timken Roller Bearing Co.* v. *N.L.R.B.*, 325 F2d 746 (6th Cir., 1963), this Court said at page 751:

"Even so, we recognize that the Union could have relinquished this right under the provisions of the bargaining agreement if it, as a part of the bargaining process, elected to do so. But such a relinquishment must be in "clear and unmistakable" language. Tide Water Associated Oil Company, 85 N.L.R.B. 1096; N. L. R. B. v. Item Company, supra, 220 F.2d 956, 958-959, C.A. 5th, cert. denied, 350 U.S. 836, 76 S.Ct. 73, 100 L.Ed. 746, rehearing denied, 350 U.S. 905, 76 S.Ct. 177, 100 L.Ed. 795. Silence in the bargaining agreement on such an issue does not meet this test. This Court said in N. L. R. B. v. J. H. Allison & Co., supra, 165 F.2d 766, 768, 3 A.L.R. 2d 990, C.A. 6th, cert. denied, 335 U.S. 814, 69 S.Ct. 31, 93 L.Ed. 369, 'Nor do we see logical justification in the view that in entering into a collective bargaining agreement for a new year, *even though the contract was silent* upon a controverted matter, the union should be held to have waived *any*

rights secured under the Act, including its right to have a say-so as to so-called merit increases." (Emphasis added.) We are of the opinion that the execution of the 1960 bargaining agreement, which was silent on this controversial question did not constitute a relinquishment of the Union's statutory right to the wage information which it now seeks. N.L.R.B. v. Hekman Furniture Co., supra, 207 F.2d 561, C.A. 6th; N.L.R.B. v. Otis Elevator Co., supra, 208 F.2d 176, 179, C.A. 2nd; N.L.R.B. v. Yawman & Erbe Mfg. Co., supra, 187 F.2d 947, 949, C.A. 2nd."

and in a different context the Supreme Court said in *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 283 (1956):

"To adopt petitioners' all-inclusive interpretation of the clause is quite a different matter. That interpretation would eliminate, for the whole year, the employees' right to strike, even if petitioners, by coercion, ousted the employees' lawful bargaining representative and, by threats of discharge, caused the employees to sign membership cards in a new union. Whatever may be said of the legality of such a waiver *when explicitly stated*, there is no adequate basis for implying its existence without a more compelling expression of it than appears in § 5 of this contract. (emphasis supplied)"

The language of the Court of Appeals for the District of Columbia seems appropriate as a description of the conclusions reached by the trial Examiner. That Court said in *International U, U.M.W. of A* v. *N.L.R.B.*, 257 F.2d 211, 217-218 (D.C. Cir., 1958):

"We sense in the Board's treatment of the problem a preference for an interpretation which results in a 'no

strike' agreement, if the writing is susceptible of such an interpretation. In International Brotherhood of Teamsters v. W. L. Mead, Inc., 1 Cir., 230 F.2d 576, and United Construction Workers v. Haislip Baking Co., 4 Cir., 223 F.2d 872, there are expressions which support the Board's preference. Such a preference is, however, no justification for, by the process of benevolent interpretation, making a contract for the parties which, to a moral certainty, they did not make for themselves. Further, as to the problem of interpretation, section 13 seems to us to have a bearing. It says:

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

This section forbids a free interpretation of the Act itself in such a way as to find in it implicit inhibitions of the right to strike."

In this contract Section 1101, *supra,* prohibits strikes or work stoppages because of disputes arising under the contract, and prohibits any strike "caused or sanctioned by the Union, or by *any member thereof,* * * *." Section 1102 provides:

> "NO SYMPATHY STRIKE
>
> Section 1102
>
> During the life of this Supplemental Agreement, no sympathy strike shall be caused or sanctioned by the Union because of differences between the AFL-CIO or any of its affiliated Unions and any other local or national employers, except for differences be-

tween the AFL-CIO or any of its affiliated Unions involving other plants of the Company."

By its terms the contract prohibits *any member of the* Union from striking because of a dispute under the contract. The sympathy strike clause relates only to sympathy strikes caused or sanctioned by the Union and makes no reference to the right of the members to refrain from crossing a picket line.

We find nothing in the language of this contract which prohibits a member of the Millers Union at the Battle Creek Plant from honoring the picket line of another Union at the same plant. If only the broad no strike clause of Section 1101 were considered perhaps the extrinsic evidence offered would be sufficient to justify the conclusion reached by the Trial Examiner, but in the light of the decision of this Court in *Timken Roller Bearing* v. *N.L.R.B.*, 325 F.2d 746 (6th Cir., 1963), we find no need for extrinsic evidence. We, therefore, conclude that the employees in question were engaged in protected concerted activity within the meaning of Section 7 and Section 8(a)(1) of the Act.

The claims of the petitioner that the employees in question refused to cross the picket line for personal reasons and that they failed to make an unconditional demand for reinstatement are clearly issues of fact which were resolved against the petitioner by the Board. These conclusions are supported by substantial evidence on the record as a whole and may not, therefore, be reviewed by this Court. 29 U.S.C. § 160(e). *N.L.R.B. v. Southern Greyhound Lines*, 426 F.2d 1299 (5th Cir., 1970); *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951).

Finally, there is a claim by the Petitioner that Putnam and Sutfin had been replaced. Clearly an employer who has

replaced striking workers in order to keep his plant functioning is not required to discharge the workers he employed as replacements once the strike is over. *N.L.R.B.* v. *Mackay Co.*, 304 U.S. 333, 345-346 (1938):

> "Nor was it an unfair labor practice to replace the striking employes with others in an effort to carry on the business. Although § 13 provides, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled."

However, the record is clear that no one was employed to replace either Putnam and Sutfin. As we read the record no one was ever assigned or hired to fill the position of Putnam. Sutfin's position was filled by another employee who was simply moved into Sutfin's position. There is no evidence in this record that anyone was hired to fill the position of the individual who was promoted to Sutfin's work. The Petitioner relies upon *N.L.R.B.* v. *Union Carbide Corporation*, 440 F.2d 54 (4th Cir., 1971). But in *Union Carbide* the Court held that workers who had honored the picket line of another union were entitled to the same status as economic strikers including the right to reinstatement if replacement had not been hired. This rec-

ord reflects no new hiring and, therefore, the reason for the rule *i.e.* to protect the workers hired to replace the strikers does not exist because there is no one to protect.

The orders of the Board will be enforced.

APPENDIX B

DECISION AND ORDER ISSUED BY THE NATIONAL LABOR RELATIONS BOARD, DATED APRIL 21, 1971

On November 5, 1970, Trial Examiner Benjamin K. Blackburn issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in certain unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed cross-exceptions and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the cross-exceptions, the briefs, and the entire record in the case, and hereby adopts the findings,[1]

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[1] We hereby correct the following inadvertent error in the Trial Examiner's Decision which in no way affects our Decision herein: In the first sentence of section III, A, "115" should be replaced by "150."

conclusions and recommendations of the Trial Examiner, only to the extent consistent herewith.

The trial Examiner found that the two alleged discriminatees were discharged for refusing to cross the picket line of another union which represented fellow employees. The Trial Examiner further found that, absent any other evidence in the record, the no-strike prohibition set forth in section 1101 clearly and unambiguously states that only strikes over grievable disputes were barred, that therefore, a strike not over a grievable dispute but in support of the economic demands of fellow employees would not fall within the clauses' ban, and, accordingly, that a conclusion that the two alleged discriminatees were discharged for engaging in a protected activity in violation of Section 8(a)(1) of the Act would be warranted.[2] However, he

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[2] The relevant contract clauses are as follows:

NO STRIKES—NO LOCKOUTS

Section 1101

(a) During the life of this Supplemental Agreement no strike or work stoppages in connection with disputes arising hereunder shall be caused or sanctioned by the Union, or by any member thereof, and no lockout shall be ordered by the Company in connection with such disputes.

NO SYMPATHY STRIKE

Section 1102

During the life of this Supplemental Agreement, no sympathy strike shall be caused or sanctioned by the Union because of differences between the AFL-CIO or any of its affiliated Unions and any other local or national employers, except for differences between the AFL-CIO or any of its affiliated Unions involving other plants of the Company.

STRIKE AUTHORIZATION

Section 1103

It is agreed that before any strike may be called the Company will be given a copy of the written authorization which is provided to the local Union by the President of the AMERICAN FEDERATION OF GRAIN MILLERS authorizing such action to be taken in accordance with its Constitution and By-Laws.

also found that the record clearly established that Respondent and the Charging Party, contrary to the express terms of section 1101, really intended to ban strikes which arise for any reason during the terms of the agreement and not just strikes over disputes grievable under its terms. In support of this conclusion he relied solely on the post-strike April 30, 1969, telegram of Roy O. Wilburn, president of the International Union and leader of all the union parties who participated in collective-bargaining negotiations, in which Wilburn told the members of the Charging Party who were refusing to cross the picket line of their fellow employees that they were violating their own contract. Relying on this telegram as evidence of the parties' intent, the Trial Examiner concluded that the two alleged discriminatees violated section 1101 by refusing to cross the picket line and that thus their conduct was unprotected. Accordingly, he found that Respondent did not violate Section 8(a)(1) of the Act when it discharged the two employees for refusing to cross the Pressmen's picket line in violation of section 1101. We believe that the Trial Examiner's conclusions are in error.

As the Trial Examiner held, in the instant case the no-strike prohibition contained in section 1101 of the contract (see fn. 2, *supra*) relates only to disputes arising under the terms of that contract and is thus not applicable to a situation where, as here, individual employees refuse to cross another union's picket line at the Employer's own plant.[3] Respondent argues that sections 1102 and 1103 (see fn. 2, *supra)* were intended also to prohibit the sympathetic refusal by individual employees to cross a picket line. While section 1102 does relate to sympathy strikes, it too

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[3] *Hoffman Beverage Company*, 163 NLRB 981.

is inapplicable to this situation. That section specifically forbids the Union to engage in a sympathy strike as a result of union differences with "any *other* local or national employers" (emphasis supplied). It is clear therefore that a sympathy strike, as in the instant case, at the Company's local plant is not prohibited by that section. Moreover, unlike section 1101, the prohibition against striking extends only to "the Union." The critical phrase "or any member thereof," which was included in section 1101, was omitted from section 1102. We interpret this omission to mean that the Union has waived for itself and its members the right to strike over a dispute arising under the terms of the contract, but has not, in any event, waived the right of its members to refuse to cross a picket line in sympathy with another union's strike. Nor do we deem relevant section 1103 which relates to the necessity of obtaining a written strike authorization as there is no evidence that the Charging Party or its International ever called a strike. The language of all of these clauses, in our view, is unambiguous.

In our opinion, the Trial Examiner erred in accepting the April 30 telegram as conclusive evidence of the parties' intent in negotiating the otherwise unequivocal no-strike clauses. Thus, the record contains other evidence that supports the contrary conclusion, namely, that the Charging Party and Respondent intended and understood that the no-strike clauses constituted merely a narrow prohibition on strike activity. In this regard we note that the Charging Party at every step of the grievance procedure concerning the two discharges took the position that the employees were engaged in concerted protected activity which was not waived by the contract, and also filed charges with the Board on the same theory. More importantly, Respon-

dent during these proceedings said that in firing these employees it was not charging a breach of any of the no-strike prohibitions but rather a violation of its work rule concerning unsatisfactory attendance. In addition, we find of critical importance in evaluating evidence of the parties' intent the total absence of any contemporaneous evidence of the bargaining history in regard to the negotiation of the various no-strike clauses which would indicate that the parties intended the no-strike commitment to be a broad one. Moreover, it appears that Respondent itself viewed the section 1101 no-strike prohibition as constituting a narrow ban on strike activity relating only to disputes cognizable under the contract, as it unsuccessfully attempted after the two discharges to obtain an agreement from the Charging Party to modify this clause to eliminate the phrase "in connection with disputes arising hereunder,"—a phrase which significantly restricted the scope of the no-strike clause in the previous agreement — and thus make the clause into the broad proscription that Respondent contends it already is.

Finally, in refusing to cross the picket line at their place of employment and report to work, the two alleged discriminatees were each assisting the labor organization then on strike. It did not matter that they were not members of the bargaining unit represented by that union. It is well settled that Section 7 of the Act protects an employee in his right to assist a labor organization regardless of whether he is eligible for membership in it and that such conduct is protected concerted activity.[4]

Since it is clear that the activities of the two alleged discriminatees were not in violation of the applicable no-

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[4] *Southern Greyhound Lines, Division of Greyhound Lines, Inc.*, 169 NLRB 627.

strike clause and were of a protected concerted nature, we find that Respondent by discharging them for such conduct violated Section 8(a)(1) of the Act.

Contrary to our dissenting colleague, we have not construed the above provisions of the parties' collective-bargaining agreement as "simply a commercial contract." As noted above, we have reviewed all the pertinent evidence in this case, including the April 30, 1969, telegram of Roy O. Wilburn, and cannot find in this history a waiver of the right of these individual employees to refuse to cross this picket line. Nor do we read the *Hearst* case,[5] on which the dissent relies, as suggesting a contrary result. There, unlike the instant case, the contracts set out no-strike clauses in the broadest terms. One contract provided: "the Union and its members individually and collectively will not, during the term of this Agreement, cause, permit, or take part in any strike, sit down, picketing or other curtailment or restricting of the delivery of the Companies' newspapers . . . "[6] While the Trial Examiner in the instant case found that the narrow no-strike clause clearly did not waive the rights of these individual employees, the Trial Examiner in *Hearst* found, with Board and court affirmance, that the contracts in question were extremely ambiguous in this respect. He therefore resorted to extraneous evidence to ascertain whether the parties had intended to prohibit refusals to cross a picket line by individual employees. The evidence on which he relied included the rejection twice by the companies of a clause proposed by one union which would have specifically

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[5] *The Hearst Corporation*, 161 NLRB 1405, enfd. *sub nom. News Union of Baltimore v. N.L.R.B.*, 393 F.2d 673 (C.A.D.C.).

[6] The other contract provided that any differences as to the rights of the parties under the contract were to be resolved "without strike."

permitted an employee to refuse to "go through or work behind any picket line." The president of one of the unions involved and virtually all the officers, both local and International, of the other union were positive that their respective contracts required their members to work behind the picket line. The unions' views, direct and unequivocal, were most persuasive in the context of no-strike clauses broad enough to be interpreted as forbidding a refusal to cross another union's picket line.

In our opinion, the considerations which require us to find in this case that the Union had not waived the right of these employees to observe a picket line of another union at this plant are equally persuasive. We do not read the *Hearst* decision as a reversal of the long-established rule that a waiver of a statutory right can only be accomplished by "clear and unmistakable" language. *Timken Roller Bearing Co. v. N.L.R.B.*, 325 F.2d 746, 751 (C.A. 6), cert. denied, 376 U.S. 971; *The Fafnir Bearing Co.*, 146 NLRB 1582, 1585. Little, indeed, of this important principle would be left if a contract, clearly ineffective as a waiver of a Section 7 statutory right, could, on the basis of a single statement by one union official, be so interpreted.

The Remedy

We have found, contrary to the Trial Examiner, that Respondent engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, by discharging Robert Sutfin and Elaine Putnam for engaging in protected concerted activities. In our opinion, it is necessary in order to effectuate the purposes of the Act that Respondent be ordered to cease and desist from engaging in such unlawful activity and to reinstate these employees with

back pay.[7] Under the facts of this case, the strike having terminated on July 22, 1969, and Respondent having failed to offer the discriminatees reinstatement, we shall direct that Respondent be required to make them whole for their loss of earnings by payment to each of them of the sum which they would normally have earned on and after July 23, 1969, the day after the picket line was removed, to the date Respondent offers them reinstatement, less their net earnings for that period. See *Difco Laboratories, Inc.*, 172 NLRB No. 235; *Southern Greyhound Lines*, 169 NLRB 627. Back pay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest added thereto in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact and upon the record as a whole, we make the following:

Conclusions of Law

1. Kellogg Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 3, American Federation of Grain Millers, AFL-CIO, and Printing Specialty and Paper Products Union Local No. 480, International Printing Pressmen and Assistants' Union of North America, AFL-CIO, are each a labor organization within the meaning of Section 2(5) of the Act.

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[7] As discharged employees who have been terminated because of resort to protected concerted activities, neither Sutfin nor Putnam was required to make an offer to return to work upon the termination of the strike. *Union Carbide Corporation*, 174 NLRB No. 147. Nor is it relevant in the case of a discriminatory discharge for engaging in concerted protected activity whether or not the discriminatees have been permanently replaced.

3. Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act by discharging Robert Sutfin and Elaine Putnam, thereby violating Section 8(a)(1) of the Act.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Kellogg Company, Battle Creek, Michigan, its officers, agents, successors, and assigns, shall take the following action in order to effectuate the purposes of the Act:

1. Cease and desist from:

(a) Interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act by discharging Robert Sutfin and Elaine Putnam because they had engaged in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action:

(a) Offer to Robert Sutfin and Elaine Putnam immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay which they may have incurred by reason of Respondent's discrimination against them in the manner described above in "The Remedy."

(b) Notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

(c) Post at its facility in Battle Creek, Michigan, copies of the attached notice marked "Appendix."* Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. Apr. 21, 1971.

John H. Fanning, Member
Gerald A. Brown, Member
National Labor Relations Board

(Seal)

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*In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Member Kennedy, dissenting:

I do not agree with the majority decision to reverse the Trial Examiner's dismissal of the complaint.

It seems to me that the majority decision is based on a misunderstanding of the nature of a collective-bargaining contract. The majority appears to treat the collective-bargaining agreement in this case as if it were simply a commercial contract to which the usual technical rules of construction, including the parol evidence rule, are applicable. This is a fundamental error.

> A collective bargaining agreement is not an ordinary contract to which apply the principles of law governing ordinary contracts. It must be construed liberally rather than narrowly and technically, and it must be read as a whole and in the light of the law relating to it when made. . . .
>
> In order to interpret a collective bargaining agreement, it is necessary to consider the scope of other related collective bargaining agreements as well as the practice, usage, and custom pertaining to all such agreements. Words in particular collective bargaining agreements are like words in a statute, in that the same word may have different meanings in different contexts, and the language in each agreement should be construed with reference to the particular practices, background, and milieu which gave rise to its use.
>
> The industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. . . . Where past practice has established a meaning for language used by the parties in a collective

> bargaining agreement, the language will be presumed to have the meaning given to it by the past practice. . . . (Footnotes omitted.)[9]

As the above quotation makes clear, if there is one rule of contract interpretation unsuitable of application to a collective bargaining agreement, it is the parol evidence rule, since the purpose of that rule is restrictive, whereas a collective-bargaining contract must be construed broadly in light of context, history, practice, etc. In *The Hearst Corporation* case,[10] the Board was confronted with a fact situation almost identical to that in this case. In that case, the employer and the ITU were parties to a collective-bargaining contract which contained a clause providing for the peaceful settlement of disputes over rights of either under the Agreement or the construction of the Agreement and forbade strikes or lockouts. Employees of the employer represented by another union went out on strike, and the members of the ITU refused to cross their picket lines. ITU officials warned their membership that a sympathetic refusal to cross the picket lines would be a breach of the no-strike clause in their collective-bargaining contract. Nevertheless the ITU members continued in their refusal to cross the picket lines. The employer responded to the sympathy strike without a lockout. In upholding the Board's finding, based in principal part on the union leaders' interpretation, that the contract forbade sympathy strikes, the court said (393 F.2d at 678):

> Petitioners urge that this evidence [union leaders' interpretation of contract] *dehors* the contract should

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[9] 48 Am. Jur. 2d, Labor and Labor Relations, § 1208.

[10] *The Hearst Corporation*, 161 NLRB 1405, *enfd. sub. nom. News Union of Baltimore v. N.L.R.B.*, 393 F.2d 673 (C.A.D.C.)

not be considered since the contract language is clear in its failure to bar observance of the picket lines. In our view, however, the Board was not required to regard the contract language as free from doubt on its face and that, in the search for intention, it was entitled to seek illumination in these external circumstances. And those circumstances were significant. The union tradition of honoring picket lines is admittedly strong, but, as its waiver in formal contract language is not to be precipitately assumed, so it is unlikely that responsible, experienced, and authoritative union leaders will lightly interpret their own handiwork barring its observance.

In the present case, the contract language in dispute was taken from the collective-bargaining contract negotiated by the Grain Millers International and several locals of the International, including Local 3, the Charging Party. Accordingly, International rather than local officials would be in the best position to know what the contracting parties meant by the language in the no-strike clauses. The International president categorically stated to the employees before any employee was discharged that a sympathy strike was forbidden by the contract. In view of the fact that "responsible, experienced, and authoritative union leaders" will not lightly interpret contract language to bar sympathy strikes in light of the union tradition of honoring picket lines, the Trial Examiner's finding that the parties intended to bar such strikes seems eminently reasonable to me. I would therefore adopt his further finding that Respondent did not discriminate against Robert Sutfin and Elaine Putnam by discharging them for engaging in a sympathy strike and would dismiss the complaint.

Ralph E. Kennedy, Member
National Labor Relations Board

Dated, Washington, D.C. Apr. 21, 1971.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Act gives you, as employees, certain rights, including the right to self-organization; to form, join or help Unions; and to bargain collectively through a representative of your own choosing.

Accordingly, we give you these assurances:

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act by discharging or by otherwise discriminating against any employees because of their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer to Robert Sutfin and Elaine Putnam immediate and full reinstatement with back pay.

KELLOGG COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

We will notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226, Telephone 313—226-3200.

APPENDIX C

TRIAL EXAMINER'S DECISION ISSUED NOVEMBER, 1970

(Before the N.L.R.B. (Case 7 . . . CA-7432(1) & (2))

Statement of the Case

Benjamin K. Blackburn, Trial Examiner: This case began on July 18, 1969,[1] when Local 3, American Federation of Grain Millers, AFL-CIO, referred to herein as the Charging Party, filed an unfair labor practice charge against Kellogg Company, referred to herein as Respondent. On July 31, 1970, the General Counsel of the National Labor Relations Board, by the Regional Director for Re-

[1] Dates are 1969 unless otherwise indicated.

gion 7 (Detroit, Mich.) issued a complaint alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Act by discharging Robert Sutfin on May 19 and Elaine Putnam on or about June 16 for refusing to cross a picket line set up at Respondent's plant by Printing Specialty and Paper Products Union Local No. 480, International Printing Pressmen and Assistants' Union of North America, AFL-CIO, referred to herein as the Pressmen. Respondent's answer, duly filed admits some of the allegations of the complaint and denies others, including the allegations that Respondent has committed any unfair labor practices. Hearing was held before me, pursuant to due notice, on September 10, 1970, in Battle Creek, Michigan. All parties appeared at the hearing and were given full opportunity to participate, to adduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Upon the entire record, including the General Counsel's oral argument at the hearing and a brief subsequently filed by Respondent, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent, a Delaware corporation, manufactures various food products. During calendar year 1969 it produced and shipped from its plant in Battle Creek directly to customers outside the State of Michigan products valued in excess of $1 million. During the same period it received in Battle Creek goods and materials also valued in excess of $1 million which were shipped there directly from suppliers outside the State of Michigan. On the basis of these admitted facts, I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

The complaint alleges, the answer admits, and I find that the Charging Party and the Pressmen are each a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Facts*

Of the approximately 3500 employees at Respondent's Battle Creek plant in April 1969, approximately 115 were represented by the Pressmen, the remainder by the Charging Party. The contracts of both Unions expired that month, the Charging Party's on April 15. Both engaged in negotiations with Respondent. The Charging Party and Respondent agreed to extend their old contract until May 2 while negotiations continued after April 15. On April 25 the Pressmen struck. Pickets appeared at Respondent's plant shortly after 2 p.m. that day. They remained there constantly until the strike ended on July 22. On April 26 the Charging Party and Respondent signed a new contract which was made retroactive to April 15.

The no-strike clause in the old contract between the Charging Party and Respondent read:

ARTICLE XI

ASSURANCE

NO STRIKES—NO LOCKOUTS

Section 1101.

(a) During the life of this Contract, no strikes or work stoppages shall be caused or sanctioned by the Union, or by any members thereof, and no lockouts shall be ordered by the Company, until the conditions of settlement provided in this agreement shall have been tried and shall have been exhausted. It is further understood that the grievance and arbitration sections of this Contract shall be used as provided herein.

(b) It shall not be considered a breach of this agreement for an employee of the Company to refuse to cross a picket line at the Plant of another employer or to refuse to enter upon the premises of such other employer, if such a refusal does not constitute a violation of subsection 303A of the Labor-Management Relations Act of 1947.

NO SYMPATHY STRIKE

Section 1102. During the life of this Contract, no sympathy strike shall be caused or sanctioned by the Union because of differences between the AFL-CIO or any of its affiliated Unions and any other local or national employers, except for differences between the AFL-CIO or any of its affiliated Unions involving other plants of the Company.

PLANT PROTECTION

Section 1103. Employees whose work is required for Plant Protection during any strike or shutdown shall be permitted faithfully to perform such services without interference from the American Federation of Grain Millers, or organizations affiliated therewith, or members thereof. The Union and the Company will agree who will perform such work.

STRIKE AUTHORIZATION

Section 1104. It is agreed that before a strike may be called, the Company will be given a copy of the written authorization which is provided to the local Union by the President of the American Federation of Grain Millers authorizing such action to be taken in accordance with its Constitution and By-Laws.

In the new contract, section 1101 of article XI reads:

(a) During the life of this Supplemental Agreement, no strike or work stoppages in connection with disputes arising hereunder shall be caused or sanctioned by the Union, or by any member thereof, and no lockout shall be ordered by the Company in connection with such disputes.

(b) It is agreed that any authorized legal strike that may be called by the Union, or any lockout by the Company on or after the expiration of the Master Agreement in an effort to secure changes in or to secure a new Master Agreement shall not be deemed a breach of the provisions of this Supplemental Agreement prohibiting strikes or work stoppages and lockouts during the life of this Supplemental Agreement.

(c) It is agreed that any authorized legal strike that may be called, or any lockout by the Company,

> on or after the expiration of this Supplemental Agreement in an effort to secure changes in or a new agreement, shall not be deemed a breach of the provisions of the Master Agreement.

Section 1102 is identical except that "Supplemental Agreement" [2] has been substituted for "Contract." Section 1103 is identical with section 1104 of the old contract. Section 1103 of the old contract has been dropped. In each contract the article in which the grievance procedure is set forth begins with language that is substantially the same. It states that a grievance shall be defined as any dispute involving a question of the application or interpretation of any matter covered by the terms of the agreement. Each contract provides for the eventual submission to arbitration of irreconciliable grievances.

As a result of the Pressmen's picket line, some employees represented by the Charging Party who were scheduled to work the 6 p.m. to midnight shift on Friday, April 25, failed to report. Among them was Elaine Putnam, a packer who had worked for Respondent since June 1962. Her husband was a striking pressman.

Whether or not the Charging Party would honor the Pressmen's picket line immediately became a news story worthy of coverage in local media. Howard Roe, president of the Charging Party, issued a statement which read:

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[2] Respondent and American Federation of Grain Millers, AFL-CIO, entered into their first master agreement in February 1969 during the life of the old contract between Respondent and the Charging Party. The master agreement covered three of Respondent's plants in addition to the one at Battle Creek, thus requiring some change in the verbiage of local agreements such as this one. The phrase "in connection with disputes arising hereunder" first appeared in the master agreement.

> We are honor bound to honor our contract. The contract has been extended until May 2, 1969. Members are not required to subject themselves to bodily harm. If this happens they are advised to go home and advise the Kellogg Company by phone of what happened.

This statement was carried in news broadcasts on local radio stations on April 25. The Battle Creek Enquirer and News' page 1 story in its April 26 editions began:

> To cross picket lines or not to honor the company contract . . .
>
> That is the question facing approximately 3,500 Kellogg Co. workers Monday when plant gates reopen after the weekend.
>
> Their answers will determine whether production at the area's largest place of employment continues or shuts down in the wake of a strike Friday by the company's 116 pressmen.

The story also attributed to Roe the statement that "he and his executive committee were instructing members to remain on the job—despite picket lines—because the company contract is still in force."

A few employees represented by the Charging Party failed to report for work because of the picket line during the week of April 28. Mrs. Putnam was off all week for that reason. Robert Sutfin, a warehouse employee since May 1963 whose father was a striking pressman, failed to report Monday, April 28, and Tuesday, April 29, for that reason. He worked Wednesday, April 30, then was off sick Thursday and Friday, May 1 and 2. Respondent attempted to contact absent employees by telephone to urge

them to return to work. On Wednesday the Charging Party purchased time on a local radio station and broadcast the following message to the employees it represented:

> Here is a message from Howard Roe, President, and Robert Willis, Business Agent of Local 3 [i.e., the Charging Party]. The American Federation of Grain Millers have received the following telegram:
>
> "A small number of members of Local 3 are violating their own contract by refusing to report to work. Please advise these members that they are in violation of a valid contract with the Kellogg Company which has been approved by the membership of Local 3 and the International Union, and further instruct these members that in order to protect their jobs they must report to work immediately."
>
> (Signed) Roy O. Wilburn
> General President American Federation of Grain Millers International Union
>
> The preceding paid for by the American Federation of Grain Millers International Union, Local 3.

As a result of Respondent's and the Charging Party's efforts, the only employees represented by the Charging Party who persisted in refusing to cross the Pressmen's picket line were Sutfin and Mrs. Putnam. Sutfin worked the week of May 5-9. He failed to report for work Monday, May 12, and thereafter because of the picket line. Mrs. Putnam was on layoff status for reasons unrelated to the strike, the weeks beginning May 5, 12, 19, and 26. She was on vacation, as arranged before the strike began, the

week of June 2. She failed to report for work on Monday, June 9, and thereafter because of the picket line.

"Unsatisfactory attendance record" is a group III violation of Respondent's rules. The normal procedure for group III violations calls for an oral warning for the first offense, a written warning for the second offense, a final warning for the third offense, and discharge for the fourth offense. The rules also state, "When a year or more elapses between violations in Group III, and the facts warrant, an employee on final warning may be given one more opportunity before being discharged." The contract between Respondent and the Charging Party provides for suspension and hearing before discharge. Grievances over discharges enter the grievance procedure at the fourth step. The contract provides for five grievance steps prior to arbitration.

Sutfin was issued an oral warning for unsatisfactory attendance on July 31, 1964, a written warning on March 10, 1966, and a final warning on February 28, 1968. On August 5, 1966, Sutfin's foreman discussed his attendance with Sutfin. The foreman told Sutfin "his attendance would have to be perfect from now on." On March 24, 1969, Sutfin's foreman reminded Sutfin he was on final warning.

Respondent suspended Sutfin on May 19. His discharge hearing was held on May 21. He filed a grievance on May 22. The fourth step meeting was held on May 28, the fifth, on June 19. Respondent refused to modify his discharge. At all stages, including the telephone conversation in which Respondent notified Sutfin that he was suspended, Sutfin informed Respondent that the reason for his current absence from work was his refusal to cross the Pressmen's picket line. Throughout, Respondent took the position that Sutfin was discharged for violation of the attendance rule,

while Sutfin and the Charging Party took the position that Sutfin was engaging in a protected activity within the meaning of the Act. When Respondent asked what Sutfin would do if his discharge were revoked, he replied that he would not return to work until the picket line was removed. Sutfin's grievance has not been taken to arbitration.

Mrs. Putnam's story is similar to Sutfin's. She was issued an oral warning for unsatisfactory attendance on August 21, 1967, a second oral warning on March 15, 1968, and a written warning on May 9, 1968. At the time of her discharge she had not received a final warning. She was suspended on June 16. Her discharge hearing was held on June 18. She grieved the same day. Fourth and fifth step grievance meetings were held on June 23 and July 2, respectively. Her discharge also still stands. She, too, informed Respondent that the reason for her current absence was her refusal to cross the Pressmen's picket line. In her case, Respondent's stated reason for discharging her was "her continued refusal to report for work and her unsatisfactory past attendance compounded by continued absence." The Charging Party protested that Respondent had deviated from the rules by discharging her without first giving her a final warning. Respondent took its stand on the facts that the rules provide a final warning as part of a "normal" procedure pointing out that the rules also state, "However, no one has a right to a certain number of warnings. It is only when an employee pledges to conduct himself properly thereafter that another chance may be granted, and continued employment can be justified" and that Mrs. Putnam, like Sutfin, said she would not return to work until the picket line was removed. The Charging Party once again took the position, to no avail, that Mrs. Putnam was engaging in legally protected activity. Mrs. Putnam's grievance has also not been taken to arbitration.

No specific persons were hired by Respondent to take the places of Sutfin and Mrs. Putnam. In Sutfin's case, another warehouse employee was promoted to his job at his rate of pay. In Mrs. Putnam's case, as well as in Sutfin's, Respondent had sufficient employees to run the plant without hiring a specific replacement for her. Respondent first hired new female employees in the ordinary operation of the plant after Mrs. Putnam's discharge on July 7. The record does not reveal when, if ever, it first hired men following the discharge of Sutfin.

On July 24 Respondent proposed to the Charging Party a modification of section 1101, paragraph (a) which would have eliminated the phrase "in connection with disputes arising hereunder." The contract between Respondent and the Charging Party has not been modified.

On July 24 Sutfin made an unconditional offer to Respondent to return to work. Mrs. Putnam has not contacted Respondent since her fifth step grievance hearing on July 2.

During the Pressmen's strike, which ended on July 22, a story appeared in the Enquirer and News on July 11 which quoted Robert Willis, business agent of the Charging Party, as having said:

> Our contracts' no-strike clause would make any member lay his job on the line if he refused to cross the pressmen's picket line in order to support the strike. . . .
>
> • • • • •
>
> Our attorneys advise us that our no-strike clause makes members liable to discharge if they fail to come to work because they refuse to cross the picket line. . . .

While not purporting to quote Willis verbatim, two other paragraphs in the same story read:

> The position of the Kellogg Co. members of the Grain Millers union in the pressmen's strike against the company is rooted in the grain millers' contract, according to Robert W. Willis, business agent for the union.
>
> • • • • •
>
> He said that two grain miller members already had been fired for failure to come to work during the strike.

B. *Analysis and Conclusions*

Respondent's first defense is that Robert Sutfin and Elaine Putnam were discharged, not for refusing to cross a picket line, but for unsatisfactory attendance. It is so obviously without merit as hardly to be worthy of serious comment. Sutfin and Mrs. Putnam were discharged for failing to report to work. They failed to report for work because they refused to cross the Pressmen's picket line. Ergo, they were fired for refusing to cross a picket line. QED.

If any further demonstration is required, consider the weight of all the evidence. Sutfin's final warning is dated more than a year before the strike. Respondent's rules provide for mercy after a year has gone by. Sutfin was absent in that year. Just a month before the strike, his foreman had occasion to remind him that he was on final warning. Respondent's written record of that conversation does not indicate that Respondent considered this the "one more opportunity" provided by the rules. On the contrary, it merely reads:

> Gordon Terry discussed [his attendance record] with Sutfin. Reminded of F.W. Sutfin said only time off work was for Drs. appointment or illness.

In Mrs. Putnam's case, her absenteeism had never been so serious as to rise to the level of a final warning, the normal prerequisite to a discharge for unsatisfactory attendance. Most important, in both cases Respondent's own minutes of discharge hearings and grievance meetings clearly establish that neither Sutfin nor Mrs. Putnam would have been discharged if they had agreed to stop honoring the picket line. There is simply no evidence in the record to support a finding that either would have been discharged when they were if there had been no strike and no picket line. Therefore, Respondent's first defense is a pretext and comes close to being a frivolous pretext. I find that Robert Sutfin and Elaine Putnam were discharged for refusing to cross a picket line.

Respondent's second defense is that Sutfin and Mrs. Putnam violated the no-strike clause of the contract between it and the Charging Party and were, therefore, legally discharged for engaging in an unprotected activity. This defense has considerable merit.

The operative words in the contract, of course, are "in connection with disputes arising hereunder," found in article XI, section 1101(a), of the new contract. The General Counsel relies on *Hoffman Beverage Company*, 163 NLRB 981, and *San Juan Lumber Company*, 154 NLRB 1153, in arguing that the Charging Party by entering into the contract, had not waived the Section 7 right of its members to refuse to cross a picket line at the plant in which they were employed in support of a strike by fellow employees represented by another union. In *Hoffman Beverage* employees represented by a Teamsters local at one

of the employer's plants picketed another of its plants to protest the closing of their own. Employees of the picketed plant who refused to cross the picket line were discharged. They were represented by a second Teamsters local, Local 282. The Board found a violation of Section 8(a)(1) of the Act on the ground that the discharged employees' refusal to cross the picket line was protected, saying:

> The collective-bargaining contract between Respondent and Local 282 does not contain a prohibition against striking except during the pendency of arbitration proceedings. Nevertheless in the *Lucas Flour* case,[3] the Supreme Court said that "a strike to settle a dispute which a collective-bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement." But the Court also indicated that such a no-strike agreement is not to be implied "beyond the area which it has been agreed will be exclusively covered by compulsory arbitration."[4] The contract between Respondent and Local 282 provides a grievance procedure with compulsory terminal arbitration in relation to disputes "concerning the application or interpretation of any provision of this Agreement, or concerning any term or condition of employment under this Agreement. . . ." When the Long Island City employees refused to cross the Pelham Manor employees' picket line, they did so, the Trial Examiner found, because of the fear of physical reprisals or out

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[3] *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105; *New York Mailers Union v. N.L.R.B.*, 327 F.2d 292 (C.A. 2).

[4] *Local 174, Teamsters v. Lucas Flour Co., supra* at 106; *San Juan Lumber Company*, 154 NLRB 1153.

of sympathy for the Pelham Manor strikers, and not because they had a dispute of their own cognizable under the grievance-arbitration provision in their agreement. Hence, the strikers' conduct was not in conflict with the implied no-strike provision, and did not lose its protected character.

In *San Juan Lumber* employees were discharged for striking because the employer had paid them with rubber checks. Once again, the Board found a violation on the ground that the strike was a protected activity, saying:

> . . . the collective-bargaining contract in effect between Respondent and the Union at the time of the events involved in this proceeding contained interrelated provisions establishing a grievance procedure and proscribing strikes and lockouts.[2] It is apparent from an examination of these provisions that the right of the employees to resort to strike action was not

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[2] Article X, "Grievances", and Article XI, "Strikes and Lockouts." These are set forth in some detail in the Trial Examiner's Decision. The provisions particularly applicable herein provide:

> Article X—Grievances
>
> In the event that any employee or group of employees have any grievances *with respect to the operation of this agreement or any article thereof*, such grievance shall be reduced to writing and shall be signed by the party or parties aggrieved, and shall be presented to the management in writing . . .
>
> Article XI—Strikes and Lockouts
>
> During the life of this agreement, no strike shall be considered or sanctioned by the Union, or any of its members and no lockouts shall be ordered by the Employer *until every peaceful method of settlement of the difficulty shall have been tried. . . .*" [Emphasis supplied.]

forfeited entirely by the parties' contract. Rather, the effect of these provisions was to defer the exercise of the right to strike, upon the occasion of any dispute, until opportunity should be afforded for settlement of the dispute through the grievance procedure, and mediation if necessary. It is also apparent that the contractual grievance procedure was limited in its application to disputes relating to the "operation" of the agreement or its respective provisions. The contract's provisions relating to wages,[3] except for cer-

[3] Essentially, all pertinent provisions are contained in article XII entitled "Wage Rates." An additional provision, permitting cancellation of the wage provision by either party upon 60 days' notice, appears in article XIII, "Term Agreement."

tain provisions relating to their modification, do no more than specify a minimum rate for workers in all departments. There are no contractual provisions governing the time, manner, or method of making wage payments. State statutes generally, as is the case here, specify minimum requirements or standards respecting such matters. We find, therefore, that here there was no dispute cognizable under the contract's grievance provisions relating to the "operation of [the] agreement or any article thereof." It follows that the employees' right to strike was not deferred by the no-strike provision, and that the employees' resort to strike action was not in conflict with that provision. Hence we find, for this reason, that the protection accorded the employees' strike activity by the National Labor Relations Act, as amended, was not forfeited by the existence of the no-strike provision.

Absent any other evidence in the record, "in connection with disputes arising hereunder" as used in the no-strike

clause in effect at all times while Sutfin and Mrs. Putnam were refusing to cross the picket line, when coupled with the introductory sentence of the grievance procedure article—"A grievance is defined as any dispute involving the application or interpretation of any provision of this Supplemental Agreement"—would admit of no interpretation other than that the parties had agreed that only strikers over grievable disputes were barred. If that were so, a strike not over a grievable dispute but in support of the economic demands of fellow employees would not fall within the no-strike clause's ban, *Hoffman Beverage* and *San Juan Lumber* would be controlling precedent, and I would, perforce find that Sutfin and Mrs. Putnam were discharged for engaging in a protected activity in violation of Section 8(a)(1). However, the record clearly establishes that such is not what "in connection with disputes arising hereunder" means since it is not what the parties who negotiated it intended it to mean.

The decisive evidence is Roy Wilburn's telegram of April 30 and the Charging Party's immediate wide circulation of it. "In connection with disputes hereunder" was first inserted into a no-strike clause in the master agreement, entered into by Respondent, the American Federation of Grain Millers, AFL-CIO, the Charging Party, and other locals of the Grain Millers on February 1. However, the master agreement was apparently not ratified until October. In any event, during their negotiations for a new local agreement, Respondent and the Charging Party inserted the new phrase in the no-strike clause of their local agreement because it was in the master agreement. Therefore, when Howard Roe, president of the Charging Party, issued his statement of April 25, he spoke with knowledge of the fact that the new wording of the no-strike clause was not an open issue. When he spoke, the no-strike clause

which was still in effect, thanks to Respondent's and the Charging Party's agreement to extend the old contract until May 2, was the broad clause of the old contract. It clearly bans strikes for whatever purpose. Consequently, the result in law, is that his statement refers only to the employees' duty not to strike under the old contract even though he probably had no fine distinction in mind when he made the statement. But no such saving fact can dilute the significance of the April 30 telegram. By that time the new contract containing the altered wording of the no-strike clause had been signed and, by its own terms, taken effect as of April 15. Therefore, when Wilburn, president of the International union and leader of all the union parties who participated in the negotiation of the master agreement, told the members of the Charging Party who were refusing to cross the picket line that they were in violation of the no-strike clause, he revealed the interpretation which Respondent and the Charging Party intended when they inserted "in connection with disputes hereunder" into their contract. Based on the record as a whole and especially on the April 30 telegram, I find that the no-strike clause in the present contract between Respondent and the Charging Party is intended to ban and, therefore, does ban strikes which arise for any reason during the term of the agreement and not just strikes over disputes grievable under its terms. When Robert Sutfin and Elaine Putnam refused to cross the Pressmen's picket line they were in violation of that no-strike clause and thus were engaged in an unprotected activity.[3] I find, therefore,

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[3] Respondent also argues that Sutfin and Mrs. Putnam were not engaged in concerted activities because each testified he decided on his own not to cross the picket line. Such a position is clearly without merit. By acting to support their economic demands on Respondent, both Sutfin and Mrs. Putnam acted concertedly with all the striking pressmen.

that Respondent did not commit unfair labor practices when it discharged them for that reason. *The Hearst Corporation, News American Division,* 161 NLRB 1405, enfd. *sub nom. The News Union of Baltimore v. N.L.R.B.,* 393 F.2d 673 (C.A.D.C.).

Having found that Respondent has not committed any unfair labor practices by discharging Sutfin and Mrs. Putnam, I do not reach the issue propounded by Respondent of whether they, as economic strikers, are entitled to reinstatement in light of the Board's *Laidlaw* doctrine.[4]

Upon the foregoing findings of fact, and on the entire record in this case, I make the following:

Conclusions of Law

1. Kellogg Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 3, American Federation of Grain Millers, AFL-CIO, and Printing Specialty and Paper Products Union Local No. 480, International Printing Pressmen and Assistants' Union of North America, AFL-CIO, are each a labor organization within the meaning of Section 2(5) of the Act.

3. The allegations of the complaint that Respondent violated Section 8(a)(1) of the Act by discharging Robert Sutfin on May 19, 1969, and Elaine Putnam on or about June 16, 1969, for refusing to cross a picket line have not been sustained.

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[4] *The Laidlaw Corporation,* 171 NLRB No. 175, enfd. 414 F.2d 99 (C.A. 7).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER

The complaint is dismissed in its entirety.

Dated at Washington, D. C.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1630

KELLOGG COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-37) is reported at 457 F. 2d 519. The decision and order of the National Labor Relations Board (Pet. App. 37-70) are reported at 189 NLRB No. 123.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1972 (Pet. App. 21). The petition for

a writ of certiorari was filed on June 16, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that the collective bargaining agreement entered into between the union and the company did not waive the right of employees covered by the agreement to decline to cross a picket line set up at their plant by fellow employees represented by another union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 3-5 of the petition.

STATEMENT

A. The Board's Findings of Fact

The Company employs approximately 3500 unionized employees at its Battle Creek, Michigan plant; about 3350 belong to Local 3 of the American Federation of Grain Millers ("Local 3"), and the remaining 150 belong to Local 480 of the Printing Specialty and Paper Products Union ("the Pressmen") (A. 147; 111).[1] The contracts of both unions

[1] "A." refers to the appendix to the briefs in the court below.

expired in April 1969. On April 26 the Company and Local 3 signed a new contract which was made retroactive to April 15 (A. 147; 109-112). The contract contained the following pertinent provisions affecting the right of Local 3 and its members to cause or engage in work stoppages (Pet. App. 38, n. 2):

> NO STRIKES—NO LOCKOUTS
>
> Section 1101
>
> (a) During the life of this Supplemental Agreement no strike or work stoppages in connection with disputes arising hereunder shall be caused or sanctioned by the Union, or by any member thereof, and no lockout shall be ordered by the Company in connection with such disputes.
>
> NO SYMPATHY STRIKE
>
> Section 1102
>
> During the life of this Supplemental Agreement, no sympathy strike shall be caused or sanctioned by the Union because of differences between the AFL-CIO or any of its affiliated Unions and any other local or national employers, except for differences between the AFL-CIO or any of its affiliated Unions involving other plants of the Company.
>
> STRIKE AUTHORIZATION
>
> Section 1103
>
> It is agreed that before a strike may be called the Company will be given a copy of

> the written authorization which is provided to the local Union by the President of the AMERICAN FEDERATION OF GRAIN MILLERS authorizing such action to be taken in accordance with its Constitution and By-laws.

Contract negotiations between the Company and the Pressmen were not successful, and on April 25 the Pressmen struck and established a picket line at the plant (Pet. App. 53). In consequence, several members of Local 3 refused to report to work for the 6:00 p.m. shift. These included Elaine Putnam, the wife of a striking pressman, and Robert Sutfin, whose father was on strike. When Putnam and Sutfin continued to refuse to cross the Pressmen's picket line, they were discharged (Pet. App. 56-60).

On April 30, a few days after the Pressmen staged their strike, the following telegram from President Wilburn of the International Union of Grain Millers was posted on Local 3's bulletin boards in the plant and was broadcast on a local radio station (A. 151-152; 67, 114):

> A small number of members of Local 3 are violating their own contract by refusing to report to work. Please advise these members that they are in violation of a valid contract with the Kellogg Company which has been approved by the membership of Local 3 and the International Union, and further instruct these members that in order to protect their jobs they must report to work immediately.

The Company also attempted to make contact with absent Local 3 members and urged them to return

to work (A. 151-152; 117). The officers of Local 3, however, while they arranged for the posting and broadcast of Wilburn's telegram, did not officially instruct Local 3 members that they had a contractual obligation to cross the Pressmen's picket line.[2] Indeed, Local 3 filed grievances concerning the discharges of Sutfin and Putnam, taking the position that they had been engaged in protected activity which was not waived by the contract. Local 3 also filed charges with the Board on the same theory (Pet. App. 40).

B. The Board's Conclusion and Order

On the foregoing facts, the Board (with one member dissenting) concluded that the Company violated Section 8(a)(1) of the Act by discharging employees Putnam and Sutfin because they had engaged in the protected activity of refusing to cross a picket line (Pet. App. 37-51). The Board rejected the Company's contention that, in the new bargaining agreement, Local 3 had surrendered its members' right to

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[2] On April 25, the day before the contract here at issue was entered into, the president of Local 3 issued a statement advising the Union members that they were required to honor the provisions of the old contract which had been extended and which prohibited them from honoring the picket line (A. 64-67). The contract here at issue was entered into on April 26, and contained a significantly different clause. Although the old contract provided that "no strikes or work stoppages shall be caused or sanctioned by the Union, or any members thereof" (A. 77), the new contract prohibited only strikes and work stoppages "in connection with disputes arising" under the contract (Pet. 5).

honor a picket line set up by fellow employees at the Battle Creek plant. The Board found that the provisions in question were "unambiguous" in establishing that "the Union [had] waived for itself and its members the right to strike over a dispute arising under the terms of the contract, but [had] not * * * waived the right of its members to refuse to cross a picket line in sympathy with another union's strike" (Pet. App. 40). The Board further found that the April 30 telegram from International Union President Wilburn did not impair this conclusion, for it was outweighed by the clear language of the contract itself, and the other evidence in the record which showed that the parties "intended and understood that the no-strike clauses constituted merely a narrow prohibition on strike activity" (Pet. App. 40).[3] The Board ordered the Company, *inter alia*,

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[3] The Board further stated (Pet. App. 40-41):

> In this regard we note that the Charging Party at every step of the grievance procedure concerning the two discharges took the position that the employees were engaged in concerted protected activity which was not waived by the contract, and also filed charges with the Board on the same theory. More importantly, Respondent during these proceedings said that in firing these employees it was not charging a breach of any of the no-strike prohibitions but rather a violation of its work rule concerning unsatisfactory attendance. In addition, we find of critical importance in evaluating evidence of the parties' intent the total absence of any contemporaneous evidence of the bargaining history in regard to the negotiation of the various no-strike clauses which would indicate that the parties intended the no-strike commitment to be a broad one. Moreover, it appears that Respondent itself viewed the section 1101 no-strike prohibition as constituting a

to reinstate employees Sutfin and Putnam with backpay (Pet. App. 45-46).

C. The Decision of the Court of Appeals

The court of appeals enforced the Board's order. Applying the principle that a union, when it relinquishes a statutory right belonging to it or the employees it represents, must do so in "clear and unmistakable" language (Pet. App. 32), the court found that there was "nothing in the language of [the parties'] contract which prohibits a member of the Millers Union at the Battle Creek Plant from honoring the picket line of another union at the same plant" (Pet. App. 35). Under these circumstances the court of appeals found it unnecessary to consider extrinsic evidence in construing the contract. The court of appeals concluded by holding that "the employees in question were engaged in protected concerted activity" when they refused to cross the Pressmen's picket line, and that thus their discharge for engaging in that activity violated Section 8(a)(1) of the Act (*ibid.*).

ARGUMENT

1. The court of appeals properly held that the right of the employees to strike could be waived only

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narrow ban on strike activity relating only to disputes cognizable under the contract, as it unsuccessfully attempted after the two discharges to obtain an agreement from the Charging Party to modify this clause to eliminate the phrase "in connection with disputes arising hereunder,"—a phrase which significantly restricted the scope of the no-strike clause in the previous agreement * * *.

by "clear and unmistakable" language. The contract, far from waiving the right to engage in a sympathy strike of the kind present here, excludes such strikes from the "no-strike clause". As the Board held (Pet. App. 39), this provision (Section 1101) of the contract prohibits only work stoppages caused or sanctioned by the Union or any of its members "in connection with disputes arising [under this Agreement]," and is "not applicable to a situation where, as here, individual employees refuse to cross another union's picket line at the Employer's own plant." The Board's interpretation is confirmed by the presence of a separate provision dealing with sympathy strikes. But, while Section 1102 of the contract does relate to such strikes, it too is inapplicable to the situation here. As the Board stated (Pet. App. 40):

> That section specifically forbids the Union to engage in a sympathy strike as a result of union differences with "any *other* local or national employers" [emphasis supplied]. It is clear therefore that a sympathy strike, as in the instant case, at the Company's local plant is not prohibited by that section. Moreover, unlike section 1101, the prohibition against striking extends only to "the Union." The critical phrase "or any other member thereof," which was included in section 1101, was omitted from section 1102. * * *[4]

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[4] The Court of Appeals relied upon the second ground stated by the Board in enforcing the order. The court held (Pet. App. 35, emphasis in original):

> By its terms the contract prohibits *any member of the* Union from striking because of a dispute under the con-

In these circumstances, the Board correctly concluded that Local 3 had not "waived the right of its members to refuse to cross a picket line in sympathy with another union's strike" (Pet. App. 40). Accordingly, there was no need to resort to extrinsic evidence to determine the intention of the parties. In any event, the Board stated that it had considered "all the pertinent evidence in this case" (Pet. App. 42), including the extrinsic evidence upon which petitioner relies (Pet. 7-8), and concluded that such evidence failed to indicate "a waiver of the right of these individual employees to cross the picket line" (Pet. App. 42; see also, *supra*, pp. 6-7, n.3).

2. Petitioner suggests that the court of appeals improperly refused to consider "extrinsic evidence" in reviewing the Board's construction of the contract. The decisions of this Court upon which petitioner relies (Pet. 11), however, merely contain restatements of the general principle that "gaps" in collective bargaining agreements may be filled by reference to "other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." *Transportation-Communication and Employees Union* v. *Union Pacific R. Co.*, 385 U.S. 157, 160-161; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-581. The instant case, unlike those

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tract. The sympathy strike clause relates only to sympathy strikes caused or sanctioned by the Union and makes no reference to the right of the members to refrain from crossing a picket line.

petitioner cites, involves the issue whether extrinsic evidence—such as the statement by an officer not of the local union but of the international union—is significant in construing an agreement which does not, as the cases require, indicate an express purpose by the employees to waive their statutory right to strike.

The two court of appeals decisions, upon which petitioner relies and which do involve similar problems, turn on their peculiar facts and are not in conflict with decision of the court of appeals here. Both cases involved "no-strike" provisions different from those present here, and the "extrinsic evidence" consisted of negotiations in which the Union had unsuccessfully attempted to obtain exemptions for sympathy strikes from "no-strike" clauses or expressly to limit the employer's right to discipline employees who participated in such strikes. *News Union of Baltimore* v. *National Labor Relations Board*, 393 F. 2d 673 (C.A.D.C.); *Montana-Dakota Utilities Co.* v. *National Labor Relations Board*, 455 F. 2d 1088 (C.A. 8); see also, *National Labor Relations Board* v. *Rockaway News Supply Co.*, 345 U.S. 71, 80. Only in the first case did the court of appeals indicate that the Board could properly consider the statements made by local union officials who participated in the drafting of the argument. As earlier noted (*supra*, p. 9), the Board here did consider the less probative "extrinsic evidence" upon which petitioner relies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,

NORTON J. COME,
Assistant General Counsel,

PAUL J. SPIELBERG,
Attorney,
National Labor Relations Board.

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